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Nos. 148-151 and 155

In the Supreme Court of the United States

OCTOBER TERM, 1946

EDGAR S. ALBRECHT ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

EDWARD J. LINNENBRINGER, PETITIONER

v.

UNITED STATES OF AMERICA

DENNIS B. PITMAN ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

A. RAY OLIVER ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

Q. W. S. S. REALTY AND INVESTMENT COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 148

EDGAR S. ALBRECHT ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 149

EDWARD J. LINNENBRINGER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 150

DENNIS B. PITMAN ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 151

A. RAY OLIVER ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 155

Q. W. S. S. REALTY AND INVESTMENT COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court in No. 151 (R. 47–52) is reported at 60 F. Supp. 741. The opinion of the district court in Nos. 149 and 150 is reported at 61 F. Supp. 199 (R. 162–180, 249–267).[1] The unreported opinion of the district court in Nos. 148 and 155 is found at R. 36–37, 103–104. The opinion of the circuit court of appeals in No. 151 (R. 77–84)[1] is reported at 155 F. 2d 73 and in Nos. 148–150 and 155 (R. 295–296) at 155 F. 2d 77.

JURISDICTION

The judgments of the circuit court of appeals were entered on April 9, 1946 (R. 303–306; No. 151, R. 85). Petitions for rehearing were denied on April 30, 1946 (R. 321, 329, 341, 349; No. 151, R. 99). The petitions for writs of certiorari were filed on June 7, 1946, in Nos. 148–151 and on June 8, 1946, in No. 155. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States is obligated to pay interest upon an award in condemnation proceed-

[1] The records in Nos. 148–150 and 155 were consolidated and will be referred to as "R." without further identification. The record in No. 151 will be referred to as "No. 151, R."

ings where no determination of just compensation is made but where the award is fixed at the insistence of the landowner in the amount set by a contract, which gave the United States the right of possession prior to payment and made no provision for interest.

STATUTES INVOLVED

The pertinent provisions of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. secs. 258a–258e, are set out in the Appendix, *infra*, pp. 19–22.

STATEMENT

These cases are among a large number of proceedings brought by the United States to condemn the fee simple title to certain lands in St. Charles County, Missouri, for the Weldon Spring Ordnance Plant (see R. 297, 295–296). The efforts of the War Department to acquire the land for the ordnance plant, its acceptance of approximately 270 contracts for the purchase of the land needed, and its subsequent unsuccessful attempt to repudiate all the contracts which had not been fully executed upon concluding that the contracts were invalid are detailed in the opinions in *United States* v. *Certain Land Situate in St. Chas. Co.*, 46 F. Supp. 921 (E. D. Mo.), reversed *sub nom. United States* v. *Muschany*, 139 F. 2d 661 (C. C. A. 8), reversed *sub nom. Muschany* v. *United States*, 324 U. S. 49. In the latter case,

this Court upheld the validity of the contracts. The petitions at hand involve several of the contracts which in their material portions are identical with those involved in the *Muschany* case, *supra*.

About six months prior to the institution of the various condemnation proceedings, the petitioners granted to the United States options to purchase their lands at fixed prices (R. 27–29, 85–93, 149–151, 237–242; No. 151, R. 36–38). These offers were duly accepted on behalf of the United States (R. 29, 93, 151, 242; No. 151, R. 38). The contracts thus executed granted to the Government the right of immediate occupancy and use of the lands for any purpose whatsoever from and after the acceptance of the options until such time as the lands should be conveyed to the Government, the titles approved by the Attorney General of the United States and the agreed purchase prices paid (R. 28, 92, 150, 241; No. 151, R. 37). The contracts provided that the landowners would convey titles free of all liens and encumbrances and, if necessary, make the titles merchantable and that the purchase prices would be paid when certificates showing the titles to be vested in the United States were furnished (R. 28, 92, 150, 241; No. 151, R. 37). The contracts further provided that (R. 29, 92–93, 151, 242; No. 151, R. 37–38):

> If for any reason the title to the land is not approved by the Attorney General, the

Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

The United States took possession under the contracts (R. 23, 93, 151, 230; No. 151, R. 17–20, 26). Thereafter it sought to repudiate the contracts and to acquire the lands by condemnation proceedings which were instituted by the filing of petitions requesting that commissioners be appointed to determine, assess and award compensation (R. 9, 63, 129, 264; No. 151, R. 4). Declarations of taking were filed with the petitions pursuant to the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, c. 307, sec. 1, 40 U. S. C. 258a, and estimated compensation in amounts substantially less than the contract

prices was deposited in court (R. 15, 74, 137, 216; No. 151, R. 10).[2] Judgments were entered on the declarations of taking stating that title in fee simple absolute to each of the tracts had vested in the United States and ordering possession to be immediately surrendered to the United States (R. 18, 79, 140, 221; No. 151, R. 15).

Petitioners filed answers (R. 21–29, 84–95, 143–153, 228–242; No. 151, R. 17–26) setting forth the purchase contracts, alleging among other things that the United States had taken possession under the contracts and that they had performed their part of the contracts. Insisting upon the validity of the contracts, petitioners sought to have judgments entered fixing the awards at the agreed purchase prices.[3] Two of them asked for interest from the date of possession (R. 153, 235–236) and one from the date of the acceptance of the contract

[2] See the following table:

Case No.	Contract Price	Estimated Just Compensation Deposited in Court	Excess of Contract Price Over Deposit
No. 148	$21,425.00 (R. 22)	$2,232.00 (R. 18)	$19,193.00
No. 149	34,000.00 (R. 149)	16,000.00 (R. 136)	18,000.00
No. 150	35,000.00 (R. 237)	14,600.00 (R. 221)	20,400.00
No. 151	70,000.00 (R. 36)	21,500.00 (R. 14)	48,500.00
No. 155	52,000.00 (R. 85)	15,280.00 (R. 78)	36,720.00

[3] In No. 155 petitioner first sought to have the condemnation proceeding dismissed (R. 95), but after the decision of this Court in the *Muschany* case, *supra*, it amended its answer and sought judgment in the amount of the contract price (R. 98–100).

(No. 151, R. 26). The others did not ask for interest at that time.

No further proceedings were had in these cases pending the litigation of the validity of the contracts in the *Muschany* case. When this Court held that the contracts were valid and binding upon the United States (*Muschany* v. *United States,* 324 U. S. 49), the United States moved in these proceedings for judgments fixing the owners' compensation for the takings in the amounts named in the contracts without interest (R. 30, 95, 154, 243; No. 151, R. 27–28) and paid into court the difference between the estimated compensation deposited when the declarations of taking were filed and the price agreed upon in the contracts (R. 34; No. 151, R. 52). Petitioners answered the Government's motions and again moved for judgments in the amount of the contract prices, four of them asking for interest at 6% on the contract prices from the date possession was alleged to have been taken to the making of the deposits with the declarations of taking and interest at 6% on the difference between the contract prices and the deposits from the date of the deposits until paid (R. 32, 100, 156; No. 151, R. 29). Petitioner in No. 150 asked for interest at 6% on the difference between the contract price and the deposit from the date of the filing of the declaration of taking until paid (R. 245).

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The Weldon Spring condemnation cases were divided among three district judges. Motions and countermotions for judgments similar to those filed in these proceedings were filed in the others and the question of the allowance of interest on the contract prices was submitted to the three judges sitting together on April 4, 1945 (R. 37; No. 151, R. 31–46). Each of the judges ruled individually on the cases pending before him. Judge Hulen wrote an opinion concluding that interest should not be allowed on the amount of the contract price (60 F. Supp. 741) and entered judgment accordingly (No. 151, R. 47–52). Upon appeal by one of the landowners, petitioner in No. 151, the circuit court of appeals affirmed (No. 151, R. 77–85). Judge Moore, whose cases included Nos. 149 and 150, wrote an opinion concluding that interest was recoverable on the difference between the contract price and the estimated compensation deposited with the declaration of taking from the date of the filing of the declaration of taking to the date of payment of the difference into court (R. 162). 61 F. Supp. 199. Judge Duncan, whose cases included Nos. 148 and 155, concurred in Judge Moore's opinion (R. 36). The United States appealed from four of the judgments entered in cases pending before Judges Moore and Duncan (R. 1, 55, 123, 197). The circuit court of appeals, stating that the cases were identical with No. 151 so far as any material

facts were concerned, reversed on the authority of its decision in No. 151 with directions to the district court to enter judgment for the consideration stipulated in the contracts without interest (R. 294, 303–306).

ARGUMENT

1. It is not disputed that the "just compensation" guaranteed by the Fifth Amendment to the Constitution includes not only the value which the property had at the date of taking but also, where the taking precedes payment, "such addition as will produce the full equivalent of that value paid contemporaneously with the taking." *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; see also *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496. Nor is it disputed that interest on the value of the property from the date of taking until payment is a "good measure" of the amount to be so added. *Seaboard Air Line Ry.* v. *United States, supra; Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *Jacobs* v. *United States*, 290 U. S. 13, 17; *United States* v. *Klamath Indians*, 304 U. S. 119, 123; cf. *Shoshone Tribe* v. *United States, supra.*

On the other hand, in the absence of a provision in the contract or a statute specifically subjecting the Government to the liability, interest does not run upon contractual claims against the Government even though there has been default in the payment of the principal. *Smyth* v. *United*

States, 302 U. S. 329, 353; *Boston Sand Co.* v. *United States,* 278 U. S. 41, 47; *United States* v. *North American Co.,* 253 U. S. 330, 336; *United States* v. *North Carolina,* 136 U. S. 211, 216; *Angarica* v. *Bayard,* 127 U. S. 251, 260; *Harvey* v. *United States,* 113 U. S. 243, 248–249.

In the instant cases the amount of the judgments has been fixed in the sums agreed upon in contracts between the Government and the owners and "just compensation" has never been determined. When the United States attempted to repudiate the contracts and instituted condemnation proceedings, the landowners objected to the Government's request for appointment of commissioners and, insisting upon the validity of the contracts, requested the court to fix the award of the sums stipulated in the contracts (R. 21–29, 84–95, 98–100, 143–153, 228–242; No. 151, R. 17–26). The sums thus agreed to may or may not represent "just compensation" within the meaning of the Constitution. The criterion for determining just compensation is the "fair market value" of the property. *United States* v. *Petty Motor Co.,* Oct. Term 1945, Nos. 77–83; *United States* v. *Miller,* 317 U. S. 369, 373–374. Here the contract prices do not represent solely an estimated value for the lands, but include such items as commissions to McDowell, the Government's agent to secure the options, and the cost of procuring title certificates. *Muschany* v. *United*

States, 324 U. S. 49, 56. Moreover, it has been the position of the Government that because of overvaluation or because of the inclusion of noncompensable items the contract prices in the Weldon Spring project were greatly in excess of fair market value. See *United States* v. *Muschany*, 139 F. 2d 661, 665–666 (C. C. A. 8). But as this Court pointed out in *Muschany* v. *United States*, 324 U. S. 49, 54–55, there was "no occasion for the trial courts to determine whether valuation measured by just compensation would have varied from the agreed price."

Thus, in these cases the liability of the United States has been determined, not under the Fifth Amendment, but under the contracts. Petitioners asserted the right to recover the contract prices and this Court sustained that claim in the *Muschany* case, *supra*. Petitioners now assert the right to receive just compensation.[4] These rights are inconsistent. *United States* v. *3.25 Acres of Land, Etc., in Seneca County*, 53 F. Supp. 884, 885–886 (W. D. N. Y.). For example, under a contract both the Government and the landowner are bound by the agreed amount even though it could be shown that "just compensation" was smaller or larger than the agreed amount. Unreasonable delay on the part of the

[4] No. 148, Pet. 7, 15, 17; No. 149, Pet. 13, 32–40; No. 150, Pet. 9–12, 21–25; No. 151, Pet. 7, 15, 17; No. 155, Pet. 13–14, 21, 26, 28–29.

United States in paying the agreed purchase prices might have justified the owners in terminating the contracts at any time during the Government's attempts to repudiate them. *United States* v. *Stott,* 140 F. 2d 941 (C. C. A. 8). In such case they would have been entitled to interest on the value of the property as part of just compensation from the date of taking to the date of payment, but the sum on which it would have been allowed would have been determined in accordance with the usual concept of just compensation.

Since petitioners insisted upon recovering their contract prices rather than just compensation, the court below correctly held that the allowance of interest in these cases would violate the rule that interest does not run on contractual claims against the Government even though there has been default in the payment of the principal (R. 303).

2. Contrary to petitioners' contention,[5] there is no conflict with this Court's decision in *Danforth* v. *United States,* 308 U. S. 271. In that case, this Court merely held that interest as part of just compensation is not allowed until there has been a taking and since there had as yet been no taking in that case, the owner was not entitled to recover interest on the award. Moreover, the agreement in that case

[5] No. 148, Pet. 12–13; No. 149, Pet. 3, 12–13; No. 150, Pet. 11; No. 151, Pet. 12–13; cf. No. 155, Pet. 21–22.

did not contemplate or provide for the taking of possession prior to payment of the award, whereas in the present cases the contracts gave the United States the right to possession and use of the property prior to payment and this right had been exercised.

Even the two district judges who held that petitioners were entitled to interest conceded that no interest would have been due if the United States had performed its part of the contract (R. 169, 256). But the failure of the United States to deposit the agreed compensation in court upon instituting the condemnation proceedings as provided in the contract does not permit the contract to be rewritten (cf. 60 F. Supp. 741, 745) or permit the owner to recover interest in violation of the rule (*supra*, pp. 9–10) that interest does not run on claims against the Government even though there has been default in the payment of the principal.

The circuit court of appeals stated (R. 302) that "by their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract." Contrary to petitioners' assertions[6] there is nothing in this

[6] No. 148, Pet. 12–13; No. 149, Pet. 3, 24–31; No. 150, Pet. 28–29; No. 151, Pet. 12–13; cf. No. 155, Pet. 24.

statement which conflicts with this Court's ruling in *Danforth* v. *United States*, 308 U. S. at 282–283, that the "effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title." The court below did not, as petitioners seem to assume, hold that the condemnation proceeding was converted to an action on a contract. If, as petitioners insist, the contracts are to be given effect on the amount of compensation awarded in the condemnation proceedings, they are controlling in their entirety. The landowners cannot insist upon the agreed prices insofar as they are favorable to them while at the same time rejecting them insofar as they are unfavorable.

3. Petitioners also contend that the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Baugh*, 149 F. 2d 190.[7] Their position is that the court below erred in not construing their contracts the same way the stipulations in the *Baugh* case were construed.[8] In that case, the United States instituted condemnation proceedings and took possession of the lands to be acquired under Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199,

[7] No. 148, Pet. 7, 17–18; No. 149, Pet. 12; No. 150, Pet. 11, No. 151, Pet. 7, 17–18; No. 155, Pet. 14–15, 24–25.

[8] No. 148, Pet. 11–12, 13–14; No. 149, Pet. 19–24; No. 150, Pet. 25–28; No. 151, Pet. 11–12, 13–14.

sec. 201, 50 U. S. C. App., Supp. IV, sec. 632. Several months later the owners entered into stipulations agreeing to certain sums as just compensation and authorizing the entry of judgment in those amounts. The stipulations stated that they were made to expedite the vesting of title in the United States and the payment of just compensation to the owners without further proceedings, but the United States did not deposit the agreed amounts in court until seven or eight months later. The court interpreted the stipulations as fixing only the value of the land and as not constituting a waiver of the right to interest to which the owners would otherwise have been entitled, stating (149 F. 2d at 193): "In view of the several express waivers made in the writing it will not be presumed to have contained any implied waivers of substantial constitutional rights." Thus, the court below was correct in saying that that case may be distinguished from the present cases in which the contracts entered into prior to the condemnation proceeding expressly gave the United States the right of possession before payment of compensation. Moreover, whether or not the Fifth Circuit was correct in its construction of the stipulations in the *Baugh* case, the decision does not present a conflict with the present cases in which the court below was construing different contracts under different circumstances.

4. Upon instituting the condemnation proceedings, the United States filed a declaration of taking and deposited estimated compensation in court under the authority of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. 258a–258e (R. 15, 74, 137, 216; No. 151, R. 10). Petitioners contend that they are entitled to interest by virtue of that Act.[9]

The Declaration of Taking Act (*infra*, p. 20) provides that upon the filing of a declaration of taking and the deposit of estimated compensation in court title to the property shall vest in the United States and:

> * * * the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

Thus, it will be observed that the Declaration of Taking Act is not a statutory exception to the rule that interest cannot be recovered against the

[9] No. 148, Pet. 15–16; No. 149, Pet. 14, 40–48; No. 150, Pet. 9–10, 16, 18, 21–25; No. 151, Pet. 15–16; No. 155, Pet. 13–14, 21–22.

United States, but merely an adoption in statutory form of the rule long recognized by the courts in allowing interest *as part of just compensation* where the Government has taken possession of the property in advance of payment of the full amount of the award. A uniform rate of interest was established as the "good measure" of the sum to be added to the value of the property to produce the full equivalent of value "paid contemporaneously with the taking," whereas previously the rate had varied in different states according to the legal rates of interest. Moreover, the Declaration of Taking Act does not preclude the parties from fixing the amount of compensation either before or after the institution of the condemnation proceeding. As has been pointed out, petitioners have elected to stand on the contracts and have opposed having "just compensation" ascertained in the condemnation proceeding as contemplated by the Act. The very terms of the Act defeat petitioners' contention because rather than providing for interest upon any agreed price it specifies that "compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest * * *."

CONCLUSION

The decisions below are correct; there is no conflict; and the cases do not present any important

question of federal law requiring further review by this Court. The petitions for writs of certiorari should therefore be denied.

Respectfully submitted.

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APPENDIX

The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. 258a–258e, reads as follows:

> [SEC. 1] * * * in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—
>
> (1) A statement of the authority under which and the public use for which said lands are taken.
>
> (2) A description of the lands taken sufficient for the identification thereof.
>
> (3) A statement of the estate or interest in said lands taken for said public use.
>
> (4) A plan showing the lands taken.
>
> (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.
>
> Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation

stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders

in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

SEC. 2. No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

SEC. 3. Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the Chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstand-

ing the provisions of section 355 of the Revised Statutes of the United States: *Provided,* That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

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